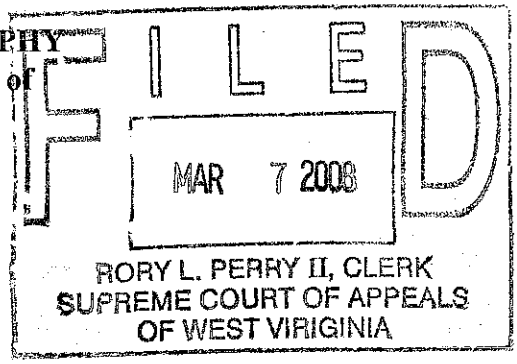
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 07-056

EVELYN L. "PEACH" MURPHY
Administrator of the Estate of
Andrew John Murphy,

Appellant,

v.



S.W. JACK DRILLING COMPANY;
KENNETH GREATHOUSE, a West Virginia resident;
and RODNEY PAXTON, a West Virginia resident;

Appellees.

BRIEF OF APPELLEE
S.W. JACK DRILLING COMPANY

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

The instant appeal stems from a wrongful death deliberate intent action filed in May 2006 by the Plaintiff below and Appellant herein against S.W. Jack Drilling Company ("S.W. Jack") and other Defendants. S.W. Jack, the Appellee herein, was granted summary judgment by the Circuit Court of Logan County based on West Virginia Code §23-4-2(c) and the recent decision by this Court in *Savilla v. Speedway SuperAmerica, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006).

On January 18, 2007, shortly after this Court's denial of the *Savilla* Appellant's Petition for Reconsideration, S.W. Jack submitted a Motion for Summary Judgment based on the fact that it was factually clear that there were no statutorily-enumerated beneficiaries in this case who can recover in a wrongful death deliberate intent action. The Plaintiff filed a response, and a hearing was held in the Circuit Court of Logan County before the Honorable Eric O'Briant on February 15, 2007. The parties presented oral arguments, and, after considering all of the evidence presented in the briefs and oral arguments, Judge O'Briant ruled that, indeed, there was no widow, widower, child or dependent in this matter who could recover in a wrongful death deliberate intent action pursuant to West Virginia Code § 23-4-2(c). Accordingly, he dismissed Plaintiff's claims against S.W. Jack.

In finding that no dependents existed, Judge O'Briant concomitantly found that Ms. Murphy, the deceased employee's mother, could not collaterally attack the prior determination in the workers' compensation system that she was not a dependent because Ms. Murphy never appealed the decision.

In reaching his decision, Judge O'Briant also rejected the Plaintiff's attempts to re-argue the issues decided in *Savilla*, and also rejected the equal protection and public policy arguments raised. He recognized that "the limited class of beneficiaries in a deliberate intent action is one of the obvious tradeoffs for the Workers' Compensation system that the Legislature has enacted." *See* Order at p. 5.

The circuit court entered its Order in favor of S.W. Jack on March 21, 2007. On April 20, 2007, Appellant filed in this Court a petition to appeal the Order. This Court granted the petition on January 10, 2008 and S.W. Jack timely files this brief in response to the brief of Appellant.

STATEMENT OF FACTS

A. The workplace incident.

Andrew John Murphy was fatally injured in a "mud pit" on a drilling site in Logan County, West Virginia on December 2, 2005. The mud pit on a drilling site resembles a small pond and holds fluids used in the drilling process. For environmental purposes, the mud pit contains a liner that is staked along the banks of the pit with four to five foot long stakes. Water in the mud pit is mixed with soap as part of the drilling process, which causes the water to become foamy at times.

The circumstances of Mr. Murphy's accident are truly not pertinent to the issues in this appeal aside from the fact that it was a fatal accident. Certainly, S.W. Jack disputes that a "deliberate intent" action lies under the facts of this case and asserts that it did not actually know of or intentionally expose Mr. Murphy to any specific unsafe working conditions that presented a high degree of risk or strong probability of serious injury or death.

B. The beneficiaries.

Under West Virginia Code § 23-4-2(c), only a narrow class of beneficiaries may take in a wrongful death deliberate intent action: the widow, widower, child or dependent of the deceased. It is undisputed that Mr. Murphy was unmarried and did not have any children. Appellant asserts that the only surviving heirs of Mr. Murphy are his mother, Evelyn Murphy, and his sister, Heather

Murphy.[1] As noted in the Petition, Evelyn Murphy currently prosecutes this action as the Administrator of Mr. Murphy's estate.

With no spouse or natural children, the only potential beneficiaries in this case are dependents. Appellant argues that there is an issue of fact as to whether Evelyn Murphy was a dependent of her nineteen-year-old son. Pertinent to this issue is the fact that, in addition to filing this lawsuit, Ms. Murphy completed an Application for Fatal Dependent's Benefits as a "dependent" of Mr. Murphy on March 16, 2006. *See* documents attached to Response to Petition for Appeal as "Exhibit A." Subsequently, by Claim Decision dated August 11, 2006, it was determined that Ms. Murphy was not a dependent, which decision was communicated to Ms. Murphy. *See* documents attached to Response to Petition for Appeal as "Exhibit B." The denial letter sent to Ms. Murphy, as the circuit court found, directly informs her of the right to protest the decision to the Office of Judges. This right, if exercised, would have resulted in further formal hearings and even appeals to the Board of Review and West Virginia Supreme Court of Appeals.

Ms. Murphy did not appeal the decision, even though she was expressly advised of this right. Additionally, both the denial and the running of the appeal time occurred after the filing of the instant suit. Pursuant to West Virginia Code § 23-5-1(b), Ms. Murphy's failure to object to the decision within thirty (30) days renders the decision final as a matter of law: "[t]his time limitation is a condition of the right to litigate the finding or action and hence jurisdictional." *Id.*

[1] Although it should be noted that Mr. Murphy has a living father who has never been advised of this lawsuit, which is at odds with Plaintiff's theory that wrongful death beneficiaries can recover in this action.

ARGUMENT OF LAW

Appellant's assignments of error in this case are a vain attempt to avoid the clear application of law to fact. It is undisputed that no person exists in this matter that is included within the limited class of beneficiaries who may recover in a wrongful death deliberate intent case. Accordingly, this Court should uphold the decision of the Circuit Court of Logan County.

A. The circuit court correctly followed West Virginia Code §23-4-2(c) and applied the clear precedent set forth in *Savilla v. Speedway SuperAmerica, LLC.*

Appellant's initial assignment of error incorrectly implies that the circuit court interpreted West Virginia Code § 23-4-2(c) as opposed to following this Court's recent decision in *Savilla v. Speedway SuperAmerica*, 219 W.Va. 758, 639 S.E.2d 850(2006). Indeed, this portion of the appeal would be more appropriately titled a "Petition for Reconsideration" of *Savilla* and should be denied for this reason alone.

1. As recognized in *Savilla*, the employee's estate cannot recover damages in a deliberate intent action, and the circuit court did not "omit" the word "employee."

Appellant's argument that the *Savilla* decision "did not address the potential of an Estate stepping into the shoes of the employee for a deliberate intent action, and further excised from West Virginia Code § 23-4-2(c) the word 'employee'" is incorrect, and, moreover, an untenable proposition.

As this Court is well aware, the *Savilla* decision examined the issue of what beneficiaries may recover in a deliberate intent action for wrongful death and held, in Syllabus Point Two:

> Pursuant to W. Va. Code § 23-4-2(c) [2005] and W. Va. Code § 55-7-6 (1992), the persons who can potentially recover "deliberate intention" damages from a decedent's employer are the persons

> specified in W. Va. Code § 23-4-2(c) [2005]: the employee's widow, widower, child, or dependent of the employee.

In so holding, this Court recognized "that potential damages recovery under a cause of action authorized by West Virginia Code § 23-4-2(c) is limited to a smaller class of beneficiaries than those persons who are set forth in [the wrongful death statute] W. Va. Code, 55-7-6." *Id.* at 219 W.Va. 758, 639 S.E.2d at 855.

Appellant's argument that the circuit court, and this Court when it rendered the *Savilla* decision, somehow missed the word "employee" is absurd. *Savilla* plainly recognizes that West Virginia Code § 23-4-2(c) provides that "[i]f **injury or death** results to any employee from the deliberate intention of his or her employer to produce the injury or death, **the employee, the widow, widower, child or dependent** of the employee has the privilege to take under this chapter and has a cause of action against the employer . . ." (emphasis added). In other words, in the case of injury, the employee may recover. In the case of death, the widow/widower, child or dependent recovers. This limitation keeps with the structure and intent of § 23-4-2(c) in that when an intentional injury is proven, the "recovery" is enlarged above that available in a regular injury situation, but the "need" based relation of the recovering party to the employee still exists. In fact, the need based-relationship to an injured employee is a foundational principle in any Workers' Compensation system.[2]

The above reading of West Virginia Code § 23-4-2(c) is the only plausible reading of the statute because under our Wrongful Death statute, which governs "every" wrongful death action, an employee's estate, and as such, the "employee," never recovers damages. West Virginia, like many

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[2] The limited class is not a mere arbitrary limitation or trade-off but rather represents the reasoned judgment of the Legislature, as the limited deliberate intent class of beneficiaries is entirely congruent with the statute's definition of "dependent." *Compare* W. Va. Code § 23-4-10(d) ("'Dependent', as used in this chapter, means a widow, widower, child under eighteen years of age . . .") with W. Va. Code § 23-4-2(c).

other states in the early 20th century, had no common law action for a wrongfully caused death. *Swope v. Keystone Coal & Coke Co.*, 89 S.E. 284, 286 (W. Va. 1916). However, the state passed its first Wrongful Death statute in the same year it achieved statehood in 1863. "As no right of action for death existed at common law, the right or cause of action for wrongful death, if maintainable, exists under and by virtue of the wrongful death statute . . ." *Baldwin v. Butcher*, 155 W. Va. 431, 433-34, 184 S.E.2d 428, 429 (1971).

Wrongful death statutes fell into two different categories as they developed. One type of statute determined damages based on the loss to the survivors of the decedent or statutory beneficiaries, and the other determined damages based on the loss to the estate of the decedent. *See, e.g.* Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. Chi. L. Rev. 537, 543 (2005). Currently, every state has either the survivor-based wrongful death statute, the estate-based wrongful death statute, or a combination of both types of wrongful death statutes. *Id.*

West Virginia's Wrongful Death statute and law follow the "loss to survivors" theory. As such, it has long been held that the personal representative serves as a trustee for the benefit of the statutory beneficiaries and not the estate:

> The right of action created by the statute is founded on a new grievance, namely, causing death, and is for the injury sustained thereby, by the widow and children, or next of kin of the deceased, for the damages must inure to their exclusive benefit. They are recovered in the name of the personal representative of the deceased, **but do not become assets of the estate**. The relation of the administrator to the fund when recovered, is not that of the representative of the deceased, but of a trustee for the benefit of the widow and next of kin. The action is for their exclusive benefit, and, if no such person existed, it could not be maintained.

Richards v. Iron Works, 56 W. Va. 510, 49 S.E. 437, 438 (1904) (citing *Jefferson R. Co. v. Swayne's Adm'r.*, 26 Ind. 477, 484 (1866)) (emphasis added). This concept is well-stated in *Trail v. Hawley*:

> It cannot be questioned that a wrongful death action . . . must be brought by the personal representative of the decedent's estate; however, that representative serves not as a representative of the deceased but as a trustee for the heirs who will receive any recovery. It follows, therefore, that the personal representative stands in a fiduciary relationship to the ultimate distributees and must act in their best interests.

163 W. Va. 626, 628, 259 S.E.2d 423, 425 (1979) (citing *Thompson v. Mann*, 65 W. Va. 648, 64 S.E. 920 (1909)).

To accept Appellant's proposal that the deceased employee's estate can "step into the shoes of the employee," as evidenced by the above, is contrary to West Virginia law.[3] In West Virginia, the deceased's estate in a wrongful death action never recovers. As such, the only proper reading of the statute, and the one already made by this Court in *Savilla*, is that the only beneficiaries who may recover in a wrongful death deliberate intent action are: the widow/widower, child or dependent of the deceased. To rule as Appellant argues undoes *Savilla's* holding and allows recovery in a deliberate intent case by anyone who is a beneficiary of the estate.[4]

The circuit court did not err in applying the clear precedent of *Savilla* to the facts of this case. Indeed, to find that a circuit court errs when it applies clear precedent would be exceedingly

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[3] Noticeably absent in both the Appellant's Petition and Brief is a citation to any authority whatsoever supporting this contention.

[4] Justice Albright's concurrence in *Savilla* makes this point and also illustrates the fact that the issue of whether the "estate" can be substituted for the "employee" was open, and closed, in *Savilla*:

> The dissent also suggests that the statutory provision for recovery by an employee in a deliberate intention case permits the recovery by the estate of that employee. The dissent suggests that the majority opinion has destroyed this right, but cites no instance in which such right has actually been recognized in West Virginia. The infirmity in the dissent's reading of the statute is illustrated by the following example: if an employee leaves his or her estate to a church, under the dissent's clearly expressed view, the church could collect deliberate intention damages.

detrimental to our common law system. Even if Appellant's contentions that *Michael v. Marion Co. Bd. of Educ.*, 198 W. Va. 523, 482 S.E.2d 140 (1996), *Cline v. Jumacris Mining Co.*, 177 W. Va. 589, 355 S.E.2d 378 (1987), and *Zelenka v. City of Weirton*, 208 W. Va. 243, 539 S.E.2d 750 (2000) implicitly recognized that under West Virginia Code § 23-4-2(c) "employee" means "estate of employee," these decisions are overruled by *Savilla*.

In summary, Appellant's own argument is handily dismissed in Appellant's own words: *"With the sole exception of the majority opinion in Savilla, there exists no other precedent* that would prevent the Estate of A.J. Murphy from stepping into the shoes of A.J. Murphy to pursue a cause of action for deliberate intent wrongful death." Appellant's Brief at pp. 12-13 (emphasis added). However, *Savilla* is the controlling precedent and is a principle of law that became so just weeks before the lower court ruled on this issue. To allow the Appellant to contest such recent law defies logic. The Circuit Court of Logan County did not err in following binding precedent, and its Order should be affirmed.

B. The circuit court did not incorrectly apply West Virginia Code § 23-4-2(c) and omit the words "as if this chapter had not been enacted."

Appellant's second assignment of error, that the circuit court omitted the words "as if this chapter had not been enacted" in its ruling, is, again, an attempt to re-argue the very same issues decided in *Savilla*. In fact, Appellant's brief could have incorporated by reference Justice Davis' dissent in *Savilla* and trimmed several pages. A circuit court does not err by following clear precedent when the facts warrant such application.

The majority opinion in *Savilla* addresses Appellant's argument head-on when it notes that "[t]he phrase 'as if this chapter had not been enacted' can be most sensibly read in most instances to mean 'as if [the immunity created by] this chapter had not been enacted." *Id.* 639 S.E.2d at 855 n. 7.

In other words, this phrase refers to the fact that in the case of deliberate intent, the claimant is granted a cause of action to recover, as if the employer did not have any immunity from civil damages, "for any excess of damages over the amount received or receivable in a claim for benefits." *W.Va. Code* § 23-4-2(c).[5] The phrase addresses the fact that the claimant is entitled to *some* damages in "excess of damages over [benefits received or receivable]," which presumably are those damages that would be available in a typical personal injury or wrongful death suit.

This interpretation is in accord with this Court's decisions in *Mooney v. Easten Assoc'd. Coal Corp.*, 174 W.Va. 350, 326 S.E.2d 427 (1985) and *Powroznik v. C&W Coal Co.*, 191 W.Va. 293, 445 S.E.2d 234 (1994). In *Mooney*, the wrongful death deliberate intent plaintiffs, a mother and daughter, were awarded typical wrongful death damages at trial. This Court discussed the damages available in a wrongful death deliberate intent suit and held that the pecuniary damages awarded to the mother and daughter of the deceased worker must be reduced to present value, while the non-pecuniary damages, "such as those awarded for mental anguish," did not. *Id.* at Syl. Pt. 3. In *Powroznik*, this Court echoed the fact that deliberate damages were over and above those that a claimant receives in a workers' compensation action and held that the workers' compensation fee schedule did not apply to the settlement of the deliberate intent claim. In other words, the tort damages to be awarded in a deliberate intent case, whether they be typical personal injury damages or those recoverable in a wrongful death suit, are separate and apart from what a claimant recovers in benefits.

[5] Under W. Va. Code § 23-2-6, an employer "is not liable to respond in damages at common law or by statute for the injury or death of any employee" if it is in good standing with workers' compensation.

To read the phrase "as if this chapter had not been enacted" as broadly as desired by Appellant completely destroys the express intent of the Legislature to establish a statutorily-defined cause of action for deliberate intent. As illustrated in Part D, *infra*, this Court has recognized since the mid-1990's that a deliberate intent case is not a suit at common law. *See, e.g. Roberts v. Consolidation Coal Co.* 208 W.Va. 218, 233, 539 S.E.2d 478, 493 (2000) ("In fact, we have specifically recognized that a deliberate intention action is sanctioned and governed by the workers' compensation statutory law in this State, and not by the common law."). An employer effectively loses immunity upon proof of deliberate intent as if that immunity had not been granted - but only in the sense that it is *liable* for deliberate intent and those damages from which it would otherwise be immune. There is no conflict with the Wrongful Death statute. To the extent that the deliberate intent action derives from the authority of the Wrongful Death statute, there is simply a narrower class of beneficiaries entitled to recover. Both are creatures of statute, and both can exist harmoniously.

Notwithstanding the above, the re-argument of the issue plainly decided by a majority of this Court in *Savilla* is simply not appropriate here. The circuit court did not err in applying West Virginia Code § 23-4-2 and *Savilla.*

C. Appellant's attempt to factually distinguish *Savilla* is a superficial argument and the circuit court did not err in applying its precedent.

Appellant's argument that *Savilla* is factually distinguishable from this case merits little response. The only facts that could materially distinguish *Savilla* would be facts that demonstrate the existence of a person entitled to recover in a deliberate intent action. As such, this argument fails to demonstrate any error by the circuit court.

D. The circuit court correctly found that the issue of Ms. Murphy's dependency was a matter finally decided and not subject to collateral attack.

Appellant next alleges error by the circuit court for finding that Ms. Murphy's failure to appeal the denial of dependency benefits renders the decision final and not subject to collateral attack. To the contrary, the circuit court correctly followed clear statutory language and appropriately ruled.

West Virginia's Workers' Compensation Statute incorporates a scheme for the "workers' compensation commission, the successor to the commission, other private insurance carriers and self-insured employers" to "hear and determine all questions within their jurisdiction." West Virginia Code § 23-5-1. The Legislature clearly provides that decisions by the Workers' Compensation Commissioner and successors thereto, if not appealed, are final, and that courts are without jurisdiction to revisit the issue.

For example, whether Ms. Murphy is entitled to the dependency benefits for which she applied is initially a question to be answered under West Virginia Code § 23-5-1. Under West Virginia Code § 23-5-1(b), upon making a decision the "commission, successor to the commission other private insurance carriers and self-insured employers..." must notify, in writing, the "employer, employee, claimant or dependent" of its finding and state the time allowed for filing an objection. From that point, the notified party has thirty days to file an objection to the finding. Without objection, the matter is finally decided:

> The action of the commission, the successor to the commission, other private insurance carriers and self-insured employers is **final** unless the employer, employee, claimant or dependent shall, within thirty days after the receipt of the notice, object in writing, to the finding. Unless an objection is filed within the thirty-day period, **the finding or action is final. This time limitation is a condition of the right to litigate the finding or action and hence jurisdictional.**

(emphasis added).

Any objection made to the initial decision goes to the Administrative Law Judges at the Office of Judges, whose decision is also "final ... unless the decision is subsequently appealed and reversed in accordance with the procedures set forth in this article." W. Va. Code § 23-5-9(g).[6] Under West Virginia Code § 23-5-10, if a party wants to appeal the decision of the Administrative Law Judge, under West Virginia Code § 23-5-10, it must appeal to the Board of Review within 60 days. Thereafter, any decision by the Board of Review is final unless appealed within 30 days, and that "time limitation [is] declared to be a condition of the right of such appeal or review and hence jurisdictional." Finally, under West Virginia Code § 23-5-15, appeals from the Board of Review go to the West Virginia Supreme Court of Appeals. The time limit for this appeal is 30 days, and meeting this time limitation is also a "condition of the right to such appeal or review and hence jurisdictional." W. Va. Code § 23-5-15 (a).

As evidenced by the above discussion of the administrative appeal process, any failure to timely appeal a decision renders such the decision final; moreover, timely appeal is **a condition of the right to litigate and hence jurisdictional.** The plain statutory language prevents later collateral attack on the issue. Further, the statute itself provides an extensive appeal process for adversely-affected parties which leads all the way to this Court. The Appellant failed to avail herself of any such rights.

Appellant continues to ignore this clear statutory language in her brief. Instead, Appellant incorrectly, and without support, argues that West Virginia Code § 23-5-1 (b) does not apply to a deliberate intent action or the circuit court's jurisdiction. This argument blatantly ignores binding

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[6] The Office of Administrative Law Judges is presently under the West Virginia Insurance Commissioner, (W. Va. Code § 23-5-8(d)), as is the Board of Review (W. Va. Code § 23-5-11(w)).

legal precedent directly refuting this claim. When West Virginia Code § 23-4-2 (c) was enacted, the common law deliberate intent action was abandoned and replaced with "a statutory direct cause of action by an employee against an employer expressed **within the workers' compensation system.**" (emphasis added) *Bell v. Vecellio & Grogan, Inc.*, Syl. Pt. 2, 197 W. Va. 138, 475 S.E.2d 138 (1996); *Roberts v. Consolidation Coal Co.*, Syl. Pt. 6, 208 W. Va. 218, 223, 539 S.E.2d 478, 483 (2000). As a result, all employees covered by the West Virginia Workers' Compensation Act are subject to **every** provision of the Workers' Compensation chapter. *Bell*, Syl. Pt. 3, 197 W. Va. at 138-39, 475 S.E.2d at 138-39. Therefore, the provisions of West Virginia Code § 23-5-1(b) are directly applicable to a deliberate intent cause of action as such action is wholly statutory and within the workers' compensation system.

Appellant further argues that the circuit court erred in relying on *Frazier v. Hrko*, 203 W. Va. 652, 510 S.E.2d 486 (1998). In *Frazier*, this Court held that when the Workers' Compensation Commissioner addresses the merits of a particular matter and there is no objection or appeal, the matter is final and may not be re-litigated or collaterally attacked in subsequent litigation. First, it should be noted that this decision illustrates the fallacy of Appellant's argument that administrative decisions cannot be binding on circuit courts. Next, there is no reason that the logic in *Frazier* should not be applied by analogy to the present case despite the self-limiting language in footnote 18. Indeed, the plain statutory language mandates the same result.[7]

Appellant cites *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), for the proposition that the administrative decision regarding Ms. Murphy's dependency should not be given preclusive effect.

[7] The successor to the commission and private insurance carriers are given the same administrative responsibilities as the Commission and their decisions are rendered with the same finality – without appeal their decisions are final and cannot be collaterally attacked.

The analysis for when an administrative decision should be given preclusive effect, however, is not applicable here. In *Miller*, it is clearly stated that the issue of whether preclusion will attach to a quasi-judicial determination only arises "**where there is no statutory authority directing otherwise.**" 194 W.Va. at 11-12, 459 S.E.2d at 122-123 (quoting Syl. Pt. 2, *Vest v. Bd. of Educ. of Co. of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995)). In this case, the Workers' Compensation Statute clearly directs that determinations are final if no appeal is made within the specified time limits, and that the issue cannot thereafter be litigated (or collaterally attacked) if the condition is not met. It is also worth mentioning, as the circuit court noted, that any appeal by Ms. Murphy would have resulted in formal evidentiary hearings similar to those used in court, and eventually a judicial forum. *See, e.g.*, W. Va. Code § 23-5-8(f) ("The chief administrative law judge has the power to hear and determine all disputed claims . . . take oaths, examine witnesses, issue subpoenas . . .").

In short, the circuit court correctly decided that there can be no collateral attack on the previously-decided dependency issue in this case. This decision is supported by the plain language of West Virginia Code § 23-5-1 and prior determinations by this Court.

E. The Legislature's creation of a narrower class of beneficiaries for deliberate intent actions does not violate state or federal equal protection law or the public policy of West Virginia.

Appellant's constitutional attack on West Virginia Code § 23-4-2(c) is not unlike the constitutional challenge to the 1996 amendments to the Workers' Compensation statute in *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E.2d 906 (1996). As in *Richardson*, this Court should be mindful of the principle of the separation of powers, and that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Id.* at 196 W.Va. 735, 474 S.E.2d 915 (internal citations omitted). Rather, "[e]very reasonable doubt must be resolved

in favor of the constitutionality of the legislative enactment in question," as "[c]ourts are not concerned with questions relating to legislative policy." *Id.* at 196 W.Va. 731, 474 S.E.2d 910.

1. The creation of a narrower class of beneficiaries who may recover in a wrongful death deliberate intent action does not violate state or federal equal protection law.

The Legislature's creation of a narrower class of beneficiaries who may recover in a wrongful death deliberate intent action is not a violation of equal protection law but, rather, a rationally-based classification that limits the extent that an employer loses immunity. Recovery for wrongful death in a deliberate intent action is limited in accordance with the need-based principle of the workers' compensation system. The equal protection contention of error by the Appellant is essentially an impeachment of the entire premise for the Workers' Compensation system, and is wholly without merit.

"Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. The claimed discrimination must be a product of state action as distinguished from a purely private activity." *Marcus v. Holley*, 217 W. Va. 508, 523, 618 S.E.2d 517, 532 (2005) (quoting Syl. Pt. 2, *Israel v. W. Va. Secondary Schools Activities Commn.*, 182 W. Va. 454, 388 S.E.2d 480 (1989)). West Virginia has three tests for analyzing different classifications for equal protection violations. *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991). Classifications involving a suspect class or fundamental/constitutional rights are given the highest level of scrutiny. *Marcus v. Holley,* 217 W. Va. at 523, 618 S.E.2d at 532. Certain classifications, such as those that are gender-based, receive an intermediate level of protection. *Id.* All other classifications, including those that deal with economic rights, receive the least level of scrutiny and are subject to a "rational basis" test. *Id.*

As Appellant admits, the economic rights at issue in this case are subject to the least level of scrutiny and the "rational basis" test. The "rational basis" is comprised of four elements and examines:

(1) if the classification is rationally based upon social, economic, historic or geographic factors;
(2) whether there is a proper governmental purpose;
(3) the classification's reasonable relationship to that purpose; and
(4) equal treatment of all persons within the class.

Marcus v. Holley, 217 W. Va. 508, 524, 618 S.E.2d 517, 533 (2005).

All four elements of the rational basis test are met by West Virginia Code § 23-4-2(c). Also, because "[t]he scope of our state equal protection concepts is coextensive [with] or broader than that of the Fourteenth Amendment to the United States Constitution," a determination by this Court that the statute does not violate the equal protection rights guaranteed by the West Virginia Constitution is also a determination that the statute does not violate the United States Constitution. *Marcus v. Holley*, 217 W. Va. 508, 523, 618 S.E.2d 517, 532 (W. Va. 2005) (quoting, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (W. Va. 1991) (quoting, in part, Syl. Pt. 3, *Robertson v. Goldman*, 179 W. Va. 453, 369 S.E.2d 888 (1988)).

a. The classification at issue is a rational classification based upon social, economic, historic or geographic factors.

When making determinations as to whether a classification is rationally based upon a social, economic, historic or geographic factor, great deference is given to the Legislature. "The classification process is peculiarly a legislative function." *Marcus v. Holley*, 217 W. Va. 508, 524, 618 S.E.2d 517, 533 (2005) (quoting *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 602, 425 S.E.2d 551, 557 (1992)). "This inquiry employs a relatively relaxed standard reflecting the Court's

awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Marcus*, 217 W. Va. at 525, 618 S.E.2d at 534.

The narrower class of beneficiaries who may recover under West Virginia Code § 23-4-2(c) is rationally based on social and economic reality. Widow/widowers, children and dependents are those whose needs must be met following the death of a worker. They suffer the most immediate and palpable loss.[8]

b. Proper government purpose.

The second element of the rational basis test is whether a proper governmental purpose exists for the statute at issue. Once again, the Legislature is given great deference in this inquiry as the courts will "hypothesize the motivations ... to find a legitimate objective." *Marcus*, 217 W. Va. at 525, 618 S.E.2d at 534 (quoting *Malmed v. Thornburgh*, 621 F.2d 565, 569 (3rd Cir.1980) *cert. denied*, 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219). Further, "a legislature need not 'actually articulate at any time the purpose or rationale supporting its classification.'" *Marcus v. Holley*, 217 W. Va. 508, 523, 618 S.E.2d 517, 532 (2005) (quoting *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)).

West Virginia's Legislature possesses a proper governmental purpose in overseeing the workers' compensation system that it instituted, as did every other state, in the early to mid-20th Century. *See* Lex K. Larson & Arthur K. Larson, *Workers Compensation Law: Cases, Materials and Text* § 2:04 (3d ed. 2000). An important part of this oversight includes maintenance of the two key components of a workers' compensation system: no-fault recovery for employees in exchange

[8] *Cf.* W.Va. Code §23-4-10, which limits death benefits to dependent widow/widowers and children under the age of 18.

for immunity from suit for employers. The hallmark of workers' compensation acts is the creation of a system whereby injured employees recover cash-wage benefits and medical care for work-related injuries regardless of fault. The cost of this system is unilaterally born by employers. In exchange for the assured benefits to employees, employees surrender their common-law rights to sue their employers for work-related injuries. In other words, employers are immune from suit as a result of participation in the compensation system, and employees' exclusive remedy is workers' compensation. *Id.* at §§ 1.01-.04.

Since the decision of *Mandolidis v. Elkins Industries,* 161 W. Va. 695, 246 S.E.2d 907 (1978), wherein it was held that an employer is subject to a common law tort action for damages or for wrongful death where such employer commits an intentional tort or engages in willful, wanton, and reckless misconduct, West Virginia's Legislature has taken a keen interest in re-defining how, and to what extent, an employer loses immunity. As stated in West Virginia Code § 23-4-2(d): **"the immunity established in sections six and six-a, article two of this chapter is an essential aspect of this workers' compensation system [and] . . . the intent of the Legislature in providing immunity from common law suit was and is to protect those immunized from litigation outside the workers' compensation system except as expressly provided in this chapter."** (emphasis supplied).

To control and define the extent to which an employer loses immunity under the workers' compensation system is certainly a proper governmental purpose. The extent of immunity is important to attract and maintain employers in the State, just as the protection of those in need following the death of a worker is important. The statutory scheme that defines when an employer can lose immunity and be sued for deliberate intent includes the determination of what beneficiaries may recover for such an action. The Legislature has a proper governmental interest in limiting this

class of beneficiaries to limit an employer's potential loss of immunity. It likewise has a proper interest in still allowing some beneficiaries of the deceased employee's estate recovery for deliberate intent – those beneficiaries most greatly affected by the loss of the worker.

c. The classification's reasonable relationship to governmental purpose.

The test for a classification's relationship to a proper government purpose is one of reasonableness. "A reviewing court should not overturn a statute under the rational basis test 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes' that the court may only conclude that the law is irrational." *Marcus v. Holley*, 217 W. Va. 508, 523, 618 S.E.2d 517, 532 (2005).

The limitation of those that may recover in a wrongful death deliberate intent case to the most immediately affected family members and dependents bears a reasonable relationship to the Legislature's legitimate interest in defining the extent to which employers may lose the immunity granted by the workers' compensation statute. The Legislature must balance the interests of protecting employer immunity, a vital component of the workers' compensation system, with the interests of permitting recovery for the exception to that immunity. Limiting that recovery to the persons financially affected by the loss of a worker is more than reasonable when viewed in this context.

West Virginia Code § 23-4-2(c) is not "irrational."[9] As recognized by the circuit court, the limitation of liability is an obvious tradeoff that is an essential aspect to the Workers' Compensation

[9] Indeed, if it was so irrational this Court probably would have dealt with the issue in *Savilla*.

system. The circuit court therefore did not err in finding that this statute does not violate equal protection law.

2. The Legislature sets public policy and does not violate it.

Appellant's final assignment of error is that the circuit court's order violated the public policy of West Virginia. This argument is a non-substantive emotional appeal that is also at odds with the concept of a workers' compensation system.

A determination of the existence of public policy in West Virginia is a question of law. Syl. Pt. 1, *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111, 174 W. Va. 321 (1984). The sources determinative of public policy are, among others, our federal state and constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government – with us – is factually established. *Id.* 325 S.E.2d at 114.

It is the very policy set by our Legislature and recognized by this Court in *Savilla* that Appellant alleges violates public policy. In other words, the very sources to which one must look for public policy are alleged to violate the same. This fact simply cannot be.

The result in this case is not harsh or unfair when consideration is given to the fact that the widow or children of the decedent would have received a significant yearly benefit from the workers' compensation system without regard to fault of the employee. The recovery in this and every deliberate intent case is the result of legislative policy and the balancing of competing interests. Appellant's contention that, in the wake of the circuit court's decision, every employer in the State is going to hire unwed, childless young people to perform highly dangerous tasks without protection is unrealistic Orwellian sensationalism. For comparison's sake, several states across the nation do not

even permit intentional injury lawsuits and make an employee's sole recovery workers' compensation benefits.[10] No public policy is violated, and affirming the circuit court's Order granting summary judgment is the proper legal result here.

CONCLUSION

The Circuit Court of Logan County did not err in following West Virginia Code § 23-4-2(c) and the recent decision by this Court in *Savilla v. Speedway SuperAmerica, LLC*. There is no widow, child or dependent to recover in this case. The facts and the law are undisputedly clear, and a re-argument of *Savilla* is not appropriate at this time.

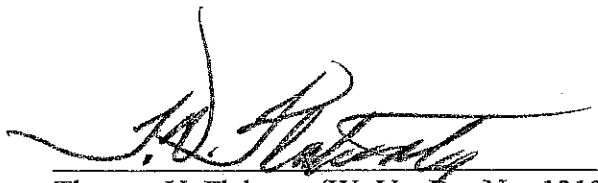
Furthermore, the circuit court did not err in its determination that there can be no collateral attack on an issue that was decided and not appealed when the statute clearly provides that appeal is a "condition of the right to litigate and hence jurisdictional." Ms. Murphy could have appealed the adverse determination of dependency by workers' compensation all the way to this very Court during the pending of this action below, but she and her counsel failed to do so.

Finally, there are no equal protection or public policy violations in this matter. It is entirely rational, reasonable and fair to enlarge the recovery for an injured employee when an intentional injury by the employer is proven, and to limit the recovery of those enlarged benefits to the classification of recipients within the premise of this system. Although the concept that no recovery may be had due to the absence of a spouse, child, or dependent is unusual in common law, the balance

[10] Alabama, Colorado, Georgia, Hawaii, Maine, Nebraska, New Hampshire, Pennsylvania, Rhode Island, Virginia, and Wyoming.

struck within the Workers' Compensation scheme between no-fault recovery for employees, employer immunity, and exceptions to that immunity must be respected.

S. W. JACK DRILLING CO.,
By Counsel



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CERTIFICATE OF SERVICE

I, Thomas V. Flaherty, counsel for Appellee, S.W. Jack Drilling Company, do hereby certify that "BRIEF OF APPELLEE S.W. JACK DRILLING COMPANY" was served upon the following counsel of record by placing true and accurate copies thereof in the United States Mail, first class, postage prepaid, this 7th day of March, 2008:

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